

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PAUL A. CLARKE and U.S. POSTAL SERVICE,  
POST OFFICE, Frederick, MD

*Docket No. 01-278; Oral Argument Held April 3, 2002;  
Issued July 8, 2002*

Appearances: *Paul Clarke, pro se; Paul J. Klingenberg, Esq., for the Director, Office of  
Workers' Compensation Programs.*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly denied appellant's request for an oral hearing as untimely filed under 5 U.S.C. § 8124(b); and (2) whether the Office abused its discretion by refusing to reopen appellant's case for review of the merits pursuant to 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

This case has previously been before the Board. In a July 22, 1992 decision, the Board found that appellant failed to establish that his dysthymic disorder was causally related to compensable factors of his federal employment. The Board also found that the Office properly denied appellant's request for a merit review of his claim. The facts of the case are set forth in that decision.<sup>1</sup>

By decision dated September 14, 1995, the Office found the medical evidence of record insufficient to establish that appellant was entitled to compensation for the period July 13, 1990 through February 26, 1995. In a July 5, 1996 letter, appellant requested reconsideration of the Office's decision.

In a decision dated July 29, 1996, the Office denied appellant's request for a merit review of his claim on the grounds that it neither raised substantive legal questions nor contained new relevant evidence. On August 15, 1996 appellant appealed the Office's decision to the Board. By order dated October 25, 1996, the Board dismissed appellant's appeal at his request.<sup>2</sup>

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<sup>1</sup> Docket No. 91-1849 (issued July 22, 1992). The Board issued an order dated November 3, 1992 denying appellant's petition for reconsideration.

<sup>2</sup> Docket No. 96-2523 (issued October 25, 1996).

In a May 31, 2000 letter, appellant requested an oral hearing before an Office representative regarding the Office's September 14, 1995 decision.

In a decision dated July 25, 2000, the Office noted its decision was issued on September 14, 1995 and appellant's request for reconsideration was postmarked June 1, 2000. The Office denied appellant's request for a hearing on the grounds that it was untimely filed pursuant to the 30-day time limitation set forth in section 8124 of the Federal Employees' Compensation Act.

In an August 1, 2000 letter, appellant requested reconsideration of the Office's September 14, 1995 decision. Appellant stated his request was accompanied by a previously submitted letter dated June 19, 2000 summarizing evidence that he alleged was not a part of his case record at the time of the Office's formal decision.<sup>3</sup> Appellant's request was accompanied by a list summarizing factual and medical evidence that he contended was not previously considered by the Office and established that he was disabled from 1990 to 1995.

By decision dated September 15, 2000, the Office denied appellant's request for reconsideration on the grounds that it was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.607(a) and it failed to present clear evidence of error.

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.<sup>4</sup> As appellant filed his appeal with the Board on October 17, 2000, the Board lacks jurisdiction to review the Office's most recent merit decision dated September 14, 1995. Consequently, the only decisions properly before the Board are the Office's July 25, 2000 decision denying appellant's request for an oral hearing and September 15, 2000 decision denying appellant's request for a merit review of his claim.

The Board finds that the Office properly denied appellant's request for an oral hearing as untimely filed under 5 U.S.C. § 8124(b).

Section 8124(b) of the Act provides that, before review under section 8128(a), a claimant for compensation who is not satisfied with a decision of the Secretary is entitled to a hearing on his claim on a request made within 30 days after the date of issuance of the decision before a representative of the Secretary.<sup>5</sup> As section 8124(b)(1) is unequivocal in setting forth the time limitation for requesting a hearing, a claimant is not entitled to a hearing as a matter of right unless the request is made within the requisite 30 days.<sup>6</sup>

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<sup>3</sup> Although appellant stated that he enclosed a copy of his June 19, 2000 letter, summarizing evidence that he contended was not a part of his case record, along with his August 1, 2000 request for reconsideration, it does not appear that it was submitted with his request. However, the record indicates that the Office received this letter on August 7, 2000 subsequent to its July 25, 2000 decision denying appellant's request for reconsideration and prior to its September 15, 2000 decision denying appellant's request for a merit review of his claim.

<sup>4</sup> 20 C.F.R. §§ 501.2(c), 501.3(d)(2); *Oel Noel Lovell*, 42 ECAB 537 (1991).

<sup>5</sup> See 5 U.S.C. § 8124(b).

<sup>6</sup> See 20 C.F.R. § 10.616(a) (1999); *Charles J. Prudencio*, 41 ECAB 499, 501 (1990).

The Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings, and the Office must exercise this discretionary authority in deciding whether to grant a hearing. Specifically, the Board has held that the Office has the discretion to grant or deny a hearing request on a claim involving an injury sustained prior to the enactment of 1966 amendments to the Act which provided the right to a hearing,<sup>7</sup> when the request is made after the 30-day period established for requesting a hearing,<sup>8</sup> or when the request is for a second hearing on the same issue.<sup>9</sup> The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.<sup>10</sup>

In the present case, appellant's hearing request was made more than 30 days after the date of issuance of the Office's prior decision dated September 14, 1995 and, thus, appellant was not entitled to a hearing as a matter of right. Appellant requested a hearing in a letter dated May 31, 2000 and postmarked June 1, 2000. Therefore, the Office was correct in stating in its July 25, 2000 decision that appellant was not entitled to a hearing as a matter of right because the hearing request was not made within 30 days of the Office's September 14, 1995 decision.

While the Office also has the discretionary power to grant a hearing when a claimant is not entitled to a hearing as a matter of right, the Office in its decision, properly exercised its discretion by stating that it had considered appellant's request and had denied it on the basis that the issue in this case could equally well be addressed by requesting reconsideration from the district Office and submitting evidence not previously considered which established that appellant was disabled from work during any period from 1990 through 1995. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.<sup>11</sup> In this case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's hearing request, which could be found to be an abuse of discretion. For these reasons, the Office properly denied appellant's request for a hearing under section 8124 of the Act.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's case for review of the merits pursuant to 5 U.S.C. § 8128(a) on the grounds that appellant's request for reconsideration was untimely filed and failed to present clear evidence of error.

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<sup>7</sup> *Rudolph Bermann*, 26 ECAB 354 (1975).

<sup>8</sup> *Herbert C. Holley*, 33 ECAB 140 (1981).

<sup>9</sup> *Johnny S. Henderson*, 34 ECAB 216 (1982).

<sup>10</sup> *Sandra F. Powell*, 45 ECAB 877 (1994).

<sup>11</sup> *Daniel J. Perea*, 42 ECAB 214 (1990).

Section 8128(a) of the Act<sup>12</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>13</sup> The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>14</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>15</sup>

In this case, the Office properly determined that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.<sup>16</sup>

As the last merit decision in this case was issued by the Office on September 14, 1995, which denied appellant's claim for compensation for the period July 13, 1990 through February 26, 1995, appellant's August 1, 2000 request for reconsideration was made outside the one-year time limitation. Thus, the Board finds that appellant's request for reconsideration was untimely filed.

Appellant contended on appeal at the oral argument held before the Board on April 3, 2002 that his October 6, 1995 letter requesting that the Office send him a copy of his case record so that he could determine how to exercise his appeal rights regarding the Office's September 14, 1995 decision constituted a request for reconsideration. Although no special form is required to request reconsideration, there must be some indication that appellant is exercising his appeal rights.<sup>17</sup> Appellant's letter does not identify the Office decision, request reconsideration or otherwise provide sufficient information to establish that appellant was attempting to exercise his appeal rights with respect to an adverse decision. Thus, the Board finds that this letter does not constitute a request for reconsideration of the Office's September 14, 1995 decision.

Appellant further contended that he requested reconsideration of the Office's decision denying his claim for lost wages for the period 1990 through 1995 in his July 18, 1998 letter.<sup>18</sup> Although appellant requested reconsideration of the Office's decision in this letter, his request

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<sup>12</sup> 5 U.S.C. § 8128(a).

<sup>13</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>14</sup> 20 C.F.R. § 10.607(a).

<sup>15</sup> See cases cited *supra* note 13.

<sup>16</sup> *Larry L. Lilton*, 44 ECAB 243 (1992).

<sup>17</sup> See *Vincent P. Taimanglo*, 45 ECAB 504 (1994).

<sup>18</sup> In his July 18, 1998 letter, appellant also requested reconsideration regarding reimbursement of lost wages for the period 1987 through 1989 and expenses for chiropractic treatment, the deeming of his modified mailhandler position unsuitable for a handicapped worker based on the Act.

was made outside the one-year time limitation. Thus, the Board finds that appellant's request for reconsideration was untimely filed.

In those cases where a request for reconsideration is not timely filed, the Board has held, however, that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.<sup>19</sup> Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>20</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue, which was decided by the Office.<sup>21</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>22</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>23</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>24</sup> This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.<sup>25</sup> To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.<sup>26</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>27</sup>

The issue for purposes of establishing clear evidence of error in this case is whether appellant has submitted evidence establishing that there was an error in the Office's decision to deny his claim for compensation for the period July 13, 1990 through February 26, 1995.

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<sup>19</sup> *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>20</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2.1602.3(d)(May 1996); *see also*, 20 C.F.R. § 10.607(b).

<sup>21</sup> *Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>22</sup> *Leona N. Travis*, 43 ECAB 227 (1991).

<sup>23</sup> *Jesus D. Sanchez*, *supra* note 13.

<sup>24</sup> *Leona N. Travis*, *supra* note 22.

<sup>25</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>26</sup> *Leon D. Faidley, Jr.*, *supra* note 13.

<sup>27</sup> *Gregory Griffin*, *supra* note 19.

In conjunction with his August 1, 2000 reconsideration request, appellant argued that the Office failed to consider evidence relevant to his claim but the documentation he provided merely contained evidence that was already part of the record. Appellant has not raised a substantial question as to the correctness of the Office's denial of his claim for compensation for the period July 13, 1990 through February 26, 1995. He has provided no evidence on reconsideration to substantiate his allegation that he was disabled for work during this period.

As the evidence submitted by appellant in support of his untimely reconsideration request does not manifest on its face that the Office committed an error in its September 14, 1995 decision, the Office did not abuse its discretion by refusing to reopen appellant's case for merit review under section 8128(a) of the Act on the grounds that his application for review was not timely filed and failed to present clear evidence of error.

The September 15 and July 25, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC  
July 8, 2002

Alec J. Koromilas  
Member

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member